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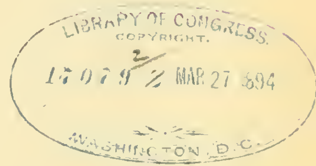
LEGAL ASPECTS

OF THE

CONTROVERSY BETWEEN THE AMERICAN COLONIES AND GREAT BRITAIN

A LECTURE



BY

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LEGAL ASPECTS OF THE CONTROVERSY BETWEEN THE AMERICAN COLONIES AND GREAT BRITAIN.

It does not consist with my purpose to pursue the history of the controversies between the colonies and the mother country; but a glance at the legal aspects of the great contentions is necessary.

The contest was, in a large sense, single and common; though it naturally had diverse manifestations, at different times and in the different colonies. It was one assault breaking upon different salients of the fortress of liberty. As a debate it was conducted, on the part of the colonies, with wonderful moderation, with the highest courage, and the most conspicuous ability. The petitions, addresses, and public papers of that time, proceeding from American sources, are not excelled in style or strength by any state papers of that great historical period. In the earlier and middle stages of the controversy the remonstrances and petitions were full of expressions of the most devoted loyalty to the English king. No doubt these expressions were sincere, as such things go. The conception of a free republican state came late and doubtingly into the minds of the most radical of the colonial leaders, and could not be sent out without a cloak until war was flagrant. Habit, family associations, a proud and reverent love for the old kingdom and the old home, and the need of a powerful protector against foreign enemies, kept the colonists loyal, in a sense — much as those who deposed James and set William and Mary upon the throne, under the act of settlement, were loyal Englishmen. The colonists did not desire separation; they were more than willing to remain English subjects; but would suffer no curtailment of the traditional rights of Englishmen. More liberty, rather than less, was the suggestion of their experience and of the conditions that surrounded them. There has been much debate as to the sincerity of the colonists in their frequent protestations of loyalty, in view of their frequent acts of resistance to the royal edicts. But the solution is easy; they were loyal to an English King who ruled within constitutional limitations and within their special charters, and made his government subserve the right ends of government; but they

would judge these matters themselves. The motto, "The king can do no wrong" implies the amenability in English law of his councillors and ministers for wrongs done.

This view was thus expressed in a resolution of the Congress of 1775 (December 6th): "But is this traitorously or against the king? We view him as the constitution represents him. That tells us he can do no wrong. The cruel and illegal attacks, which we oppose, have no foundation in the royal authority. We will not, on our part, lose the distinction between the king and his ministers: happy would it have been for some former princes had it always been preserved on the part of the crown." —*Jour. Cong.*, I, 200.

Speaking with fine satire of the charge that Americans had from the beginning contemplated independence, Justice Drayton, of South Carolina, in a charge to the grand jury in 1776, said: "There was a time when the American army before Boston had not a thousand-weight of gunpowder—the forces were unable to advance into Canada, until they received a small supply of powder from this country, and for which the general Congress expressly sent—and when we took up arms a few months before, we begun with a stock of five hundred-weight! These grand magazines of ammunition demonstrate, to be sure, that America, or even Massachusetts Bay, was preparing to enter the military road to independence!"

And George Mason, writing in 1778, says of the question of the first intention of the colonists:

"Equally false is the assertion that independence was originally designed here. Things have gone such lengths, that it is a matter of moonshine to us whether independence was first intended or not, and therefore we may now be believed. The truth is, we have been forced into it."

The inherited English reverence for the king had a strong hold upon the minds of the colonists. The most ardent and radical of the colonial leaders held his tongue and pen under a severe restraint when he spoke of the king. Such was the reverence of the masses of the people for the crown that, almost up to the time of the spilling of blood, denunciation of the king, or a proposal to throw off their allegiance to him, would have been received with general disfavor. When the Congress of 1774 assembled, the general thought and hopes of the people ran in the direction of a peaceable adjustment upon the basis of the continued sovereignty of the English king. They did not complain of the king, but to him—much as a

boy might complain to an absent father of the cruelties of his tutor. There were historical precedents for this strange mingling of deference and resistance.

The men of Flushing swore fidelity to the king and to William of Orange as his stadt-holder when they were in arms against Alva, the king's governor; and Henry of Navarre wrote to Henry III, "Thank God, I have beaten your enemies and your army."

So the convention of deputies of New Hampshire, in January 1775, urged the training of the militia for the defense of the country if it should "ever be invaded by his majesty's enemies," who were his majesty's soldiers.

The colonists were quite sincere when they said they did not aim at independence; but there was never a time when, presented as the alternative of arbitrary rule, they would not have embraced it. Barré, in his famous speech upon the Stamp Act, in the English House of Commons, said of the colonists: "The people there are as truly loyal, I believe, as any subjects the king has; but a people jealous of their liberties, and who will vindicate them if they should be violated."—*Rise of the Republic*, 176.

In an address to the people of Great Britain, Ocotober 1774, Congress said: "Permit us to be as free as yourselves, and we shall ever esteem a union with you to be our greatest glory and our greatest happiness; we shall ever be willing to contribute all in our power to the welfare of the empire; we shall consider your enemies as our enemies, and your interest as our own. But, if you are determined that your ministers shall wantonly sport with the rights of mankind—if neither the voice of justice, the dictates of the law, the principles of the constitution, or the suggestions of humanity, can restrain your hands from shedding human blood in such an impious cause, we must then tell you that we will never submit to be hewers of wood or drawers of water for any ministry or nation in the world."

And the Congress of 1775 made this response: "We are accused of 'forgetting the allegiance which we owe to the power that has protected and sustained us.' Why all this ambiguity and obscurity in what ought to be so plain and obvious as that he who runs may read it? What allegiance is it that we forget? Allegiance to parliament? We never owed—we never owned it. Allegiance to our king? Our words have ever avowed it, our conduct has ever been consistent with it."

The English government by a cabinet was not then in as perfect operation as now: but our ancestors were not pursuing an altogether

fanciful line when they appealed to the king against the ministry. If one of the present English colonies should suffer oppression, it would justly and strictly be chargeable to Lord Rosebery and not to the queen.

It may be well here to say a further word as to the source of the British dominion in the American colonies. If that dominion had its origin in discovery and occupancy, the powers of the crown and the rights of the colonists were very different from what they would have been if the dominion had been acquired by conquest.

Mr. Blackstone's view was that the lands in America had been acquired by conquest and the rule as to such colonies he states thus: "But in conquered or ceded countries, that have already laws of their own, the king may, indeed, alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country." While as to newly discovered lands he says: "For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the laws then in being, which are the birthright of every subject, are immediately there in force."

Judge Story, in his commentaries, satisfactorily refutes this view and shows that the claim of England and, indeed, of all the European governments, to American territory, was based upon discovery. This was true, he thinks, even of the Dutch settlements of New York, for England did not rest her title to that province upon conquest, but rather the conquest upon an antecedent right founded upon discovery.

The Indians, Judge Story shows, were not a conquered people; and, if they were such, had no laws or organized government which could be assumed and enforced until the pleasure of the king was known. He says: "Even in case of a conquered country where there are no laws at all existing, or none which are adapted to a civilized community, or where the laws are silent, or are rejected and none substituted, the territory must be governed according to the rules of natural equity and right. And Englishmen removing thither must be deemed to carry with them those rights and privileges which belong to them in their native country." — *Story*, I, 154.

He further shows that, even if the doctrine of Blackstone were right upon general principles, it did not apply to the American colonies. — *Story*, I, 156.

That we may understand what particular rights were claimed by the colonists as Englishmen, or under their charters, and the view taken of these claims in England, I quote here from some of

the most careful and notable expressions of the time. The right that came most to the front in the debate was, as I have said, the right to be exempt from taxes not voted by themselves; but it was soon found that this involved the larger question as to the power of Parliament to legislate in other, or indeed in any matters, affecting the colonies.

The prevailing English view was that the legislative power of Parliament extended to all colonial matters and was supreme. This view was expressed in a Declarative Act in these unambiguous and sweeping sentences: "All His Majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and Parliament of Great Britain, who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects to the crown of Great Britain, in all cases whatsoever."

But there were not a few liberal and learned English statesmen who took a different view and boldly opposed the oppressive measures of the ministry. The power of the Parliament to tax the colonies was denied by some of these.

About 1680 the Marquis of Halifax, a member of the privy council, in opposing arbitrary measures against the colonies, declared that "he could not agree to live under a king who should have it in his power to take when he pleased the money which he (Halifax) had in his pocket."—*Rise of Rep.*, 78.

Mr. Burke, in his speech on the taxation of America in 1774, says, speaking of the contest for liberty in England: "They took infinite pains to inculcate, as a fundamental principle, that in all monarchies the people must in effect themselves mediately or immediately possess the power of granting their own money, or no shadow of liberty could subsist. The colonies draw from you, as with their life-blood, these ideas and principles. Their love of liberty, as with you, is fixed and attached on this specific point of taxing. Liberty might be safe or might be endangered in twenty other particulars, without their being much pleased or alarmed. Here they felt its pulse; and, as they found that beat, they thought themselves sick or sound. I do not say whether they were right or wrong in applying your general argument to their own case. It is not easy, indeed, to make a monopoly of theorems and corollaries. The fact is, that they did thus apply those general arguments; and your mode of governing them, whether through lenity or indolence, through wisdom or mistake, confirmed them in the imagina-

tion that they, as well as you, had an interest in these common principles."

Among other circumstances which had brought the colonists to the views of liberty held by them, Mr. Burke speaks of the effect of education, and says that in no country, perhaps, in the world was the law so generally studied.

The Earl of Chatham, speaking on the bill declaring the sovereignty of Great Britain over the colonies, said: "My position is this — I repeat it — I will maintain it to my last hour — taxation and representation are inseparable; this position is founded on the laws of nature; it is itself an eternal law of nature; for whatever is a man's own is absolutely his own; no man has a right to take it from him without his consent, either expressed by himself or representative; whoever attempts to do it attempts an injury; whoever does it commits a robbery; he throws down and destroys the distinction between liberty and slavery. Taxation and representation are coeval with and essential to this constitution." In the same speech he recites the fact that the Palatinate of Chester had resisted a tax upon the ground of non-representation; and, upon their petition, the king had allowed their plea. "In short, my lord," said he, "from the whole of our history, from the earliest period, you will find that taxation and representation were always united." — *Niles' Principles and Acts of Revolution.*

Pitt, in his speech in the House of Lords, in December, 1775, said: "Let the sacredness of their property remain inviolate; let it be taxable only by their own consent, given in their provincial assemblies, else it will cease to be property." And again, in the same speech, he said: "Let this distinction then remain forever ascertained. Taxation is theirs, commercial regulation is ours. As an American, I would recognize to England her supreme right of regulating commerce and navigation. As an Englishman by birth and principle, I recognize to the Americans their supreme, unalienable right to their property; a right which they are justified in the defence of, to the extremity." (458)

A few quotations now setting forth the American view — chiefly from the resolves of Congress and the colonial assemblies — will enable us to have a clear comprehension of the great issue that was about to be set down for trial.

As early as 1680 we have a voice from New Jersey declaring that "It was a fundamental in their constitution and government that the king of England could not justly take his subjects' goods without their consent."

Among the declarations of the Continental Congress of 1765 was this: "That all supplies to the crown, being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to his majesty the property of the colonists."

In the address of this Congress to the House of Commons it is said "that the parliament, adhering strictly to the principle of the constitution, have never hitherto taxed any but those who were therein actually represented; for this reason we humbly apprehend, they never have taxed Ireland, nor any other of the subjects without the realm." In this Congress there was much discussion as to the basis or origin of the rights claimed by the colonies, and in the course of the discussion Christopner Gadsden said: "A confirmation of our essential and common rights as Englishmen may be pleaded from charters safely enough; but any further dependence on them may be fatal. We should stand upon the broad common ground of those natural rights that we all feel and know as men and as descendants of Englishmen. I wish the charters may not ensnare us at last by drawing different colonies to act differently in this great cause. Whenever that is the case, all will be over with the whole. There ought to be no New England man, no New Yorker, known on the continent; but all of us Americans." How wisely, how nobly spoken! And this voice was from South Carolina—"All of us Americans." The way was long from provincial narrowness and jealousy to a broad nationalism; from a local citizenship, of which the world took no notice, to a national citizenship that boldly challenged the world's deference. But in 1865—just one hundred years after the speaking of these immortal words—the hope of the eloquent South Carolinian bursts into the dawn; and today, as never before, we are "all of us Americans."

Among the resolutions adopted by the Congress of (October 14) 1774, was the following: "Resolved, 4, that the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council; and, as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has heretofore been used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British

parliament as are *bona fide*, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members, excluding every idea of taxation internal or external for raising a revenue on the subjects in America without their consent."

It seems that the committee was hopelessly divided on the question of the powers of Parliament and that the terms used in the 4th resolution, as adopted, were accepted as a compromise, not of opinions but of phrases; a practice quite familiar in modern political conventions. Mr. John Adams suggested the declaration that, from "the necessity of the case" the colonists "consented" to the operation of laws regulating external commerce, excluding "every idea of taxation internal or external for raising a revenue on the subjects in America without their consent." The one side could argue that this was a consent to the rightfulness of such laws, and the other that the laws derived their rightfulness from the consent; while the denial of every idea of taxation left the one side free to say, in a particular case, that taxation was not the idea, but only an incident of the law; and the other to argue that where taxation resulted it must have been intended.

This resolution has an especial significance in two particulars—first, it declares that the colonies could not be properly represented in the British Parliament; and second, it expresses a consent to the general regulations of commerce by the Parliament, provided every idea of revenue was excluded. The last was a compromise view—a concession in the interests of peace; but the binding force of parliamentary navigation acts was distinctly put upon the consent of the colonies.

In a declaration by the Congress of 1775 justifying resistance—after enumerating some of the colonial grievances—it is said: "But why should we enumerate our injuries in detail? By one statute it is declared that parliament can 'of right make laws to bind us in all cases whatsoever.' What is to defend us against so enormous, so unlimited a power? Not a single man of those who assume it, is chosen by us; or is subject to our control or influence; but on the contrary, *they are all of them exempt from the operation of such laws*, and an American revenue, if not diverted from the ostensible purposes for which it is raised, would actually lighten their own burdens in proportion as they increase ours."

The colonists would not be bound by acts of Parliament because they were not represented there; but would they have accepted

representation in Parliament as a basis of settlement? I think not. The letter of appointment and instruction from the Assembly of Massachusetts to the delegates of the colony to the Congress of 1765, which assembled in New York, contained these paragraphs: "If it should be said that we are in any manner represented in Parliament you must by no means concede to it; it is an opinion which this house cannot see the least reason to adopt. Further, the house think that such a representation of the colonies as British subjects are to enjoy, would be attended with the greatest difficulty, if it is not absolutely impracticable, and therefore, you are not to urge or consent to any proposal for any representation, if such be made in the Congress."

In speaking of the English opposition to the suggestion that the difficulties between the mother country and the colonies might be obviated by admitting representatives of the colonies in Parliament, Doctor Franklin said: "But the pride of this people cannot bear the thought of it, and therefore it will be delayed. Every man in England seems to consider himself as a piece of a sovereign over America, seems to jostle himself into the throne with the king and talk of 'our subjects in the colonies.'"

They would not be taxed by Parliament, because they were not represented in Parliament, and they did not seek representation in Parliament because it could not in the nature of things be adequate. It would have been delusive—no better practically than the then prevailing system of maintaining colonial agents in London. The colonial members in the House of Commons could not defeat, and their presence there could only give sanction to hostile legislation. Taxes might have been voted without the consent of a single representative of the communities from which the levies were to be raised, and by the votes of those whose burdens would have been lightened by the legislation. The grants would still have been by the people of Great Britain of the property of the colonists. The argument of the colonists stated in full was: We cannot lawfully be taxed by a body in which we have no representation. We are not represented in the English Parliament; therefore we cannot be taxed by Parliament. We cannot in the nature of things have any real representation in the Parliament—therefore we will be taxed only by our colonial assemblies.

Our forefathers were wise, but very practical men; not mere casuists or philosophers. They saw that an admission of the power of the Parliament to tax them involved the destruction of their liberties and the confiscation of their property—and with an

alertness and courage that was admirable they resisted. They would not admit the tip of the camel's nose inside the tent. They maintained with much learning, and with convincing force, that the Parliament could not do this or that — and this or that included pretty much every act that affected them injuriously; but they made no schedule of the things Parliament might do. They at once boldly joined issue with the parliamentary declaration that it was authorized "to bind the colonies and people of America in all cases whatsoever." Possibly there were cases in which Parliament might legislate for them in an indirect way; but they would not attempt general definitions; they would deal only with particulars — with the concrete and not with the abstract — they would see the proposed statute and admit or exclude it. Just what the powers of Parliament over the colonies were was a hard question, and is still a hard question for the student of constitutional history. There seems to have been no safe middle ground found between the admission of full powers on the one hand, and a total denial of any on the other. Satisfactory English precedents were wanting. That taxes were grants to be freely voted by those who were to pay them, through their representatives, was an established principle. But how far general laws, such as laws regulating navigation and other general interests of the whole kingdom, might be made for the colonies by the Parliament in which they were not represented was not clear. It turned upon the question, how far the principle that all laws derive their sanction from the consent of the governed, was a part of the English Constitution, and upon the further question, whether the right of Englishmen to have a voice in the making of the laws that were to govern them was possessed by the colonists.

Mr. Story says: "In respect to the political relations of the colonies with the parent country, it is not easy to state the exact limits of the dependency which was admitted, and the extent of sovereignty which might be lawfully exercised over them, either by the crown or by parliament." — Sec. 183.

Of the authority of Parliament, he says: "In regard to the authority of Parliament to enact laws which should be binding upon them, there was quite as much obscurity and still more jealousy spreading over the whole subject. . . . No acts of parliament, however, were understood to bind the colonies unless expressly named therein. — Sec. 187.

"But it was by no means an uncommon opinion in some of the colonies, especially in the proprietary and charter governments,

that no act of parliament whatsoever could bind them without their own consent."—Sec. 188.

Mr. Story says that after the passage of the stamp act the subject was re-examined in the colonies, especially in connection with the declaration by Parliament of an absolute power of legislation; and that many of the leading minds "passed by an easy transition to a denial, first, of the power of taxation, and next, of all authority whatever to bind them by its laws."

He quotes James Wilson, of Pennsylvania, as saying that he entered upon the inquiry "with a view and expectation of being able to trace some constitutional line between those cases in which we ought and those in which we ought not to acknowledge the power of Parliament over us"; but that in the prosecution of his inquiries he became convinced that such a line did not exist and that there could be "no medium between acknowledging and denying that power in all cases." — *Story*, I, 192.

When Governor Hutchinson, in 1773, said in an address to the general court of Massachusetts that he "knew of no line that should be drawn between the supreme authority of parliament and the total independence of the colony," it was answered by the general court that Parliament was not supreme and that "the drawing the line between the supreme authority of parliament and total independence was a profound question and not to be proposed without their consent in a general congress."

The governor undertook — and with some success — to point out the many illustrations in the legislation of the colony of the recognition of the validity and force of acts of Parliament. Among these he mentions the settlement of the crown upon William and Mary by an act of Parliament, and the accompanying act of Parliament by which oaths of allegiance to King James were discharged and provision made for oaths to King William and Queen Mary.

The Assembly, replying to this address of the governor, argued that the words of limitation in the charter, upon the legislative power of the colonies — namely, that the laws made should not be repugnant to the laws of England — had relation to the great charter and other laws of England by which the lives, the liberties, and property of Englishmen were secured, and not to the general legislation of Parliament. The right to be represented in the legislative body was asserted as a fundamental principle of the English Constitution, and one that the Parliament could not impair or disregard. The particular instances cited by the governor of submis-

sion by the colony to particular acts of Parliament they met by the declaration that the accession of William and Mary, while not proclaimed by an act of the colony, was based upon the universal consent of the people. They declared that "a purely voluntary submission to an act, because it is highly in our favor and for our benefit, is in all equity and justice to be deemed as not at all proceeding from the right we include in the legislators, that thereby obtain an authority over us, and that ever hereafter we must obey them of duty." That while "they may have submitted, *sub silentio*, to some acts of Parliament, that they conceived might operate for their benefit, they did not conceive themselves bound by any of its acts which, they judged, would operate to the injury even of individuals." Concluding, they said: "We think your Excellency has not proved, either that the colony is a part of the politic society of England, or that it has ever consented that the Parliament of England or Great Britain, should make laws binding upon us, in all cases, whether made expressly to refer to us or not."

In the notes of Mr. Jefferson on the debate upon the adoption of the Declaration of Independence he represents John Adams, Lee, and others who favored the adoption to have held this view of the powers of Parliament: "That, as to the people or Parliament of England we had always been independent of them, their restraints on our trade deriving effect from our acquiescence only and not from any rights they had of imposing them, and that so far our connection had been federal only and was now dissolved by the commencement of hostilities." The Declaration itself makes no direct reference to Parliament, but, in the schedule of the unlawful acts of the king refers to the Parliament in these terms: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation.

It would seem that, if any power to legislate for the colonies was possessed by Parliament, it would include the power to establish a system of import duties, common to them all—for this was a subject that colonial legislation could not adequately deal with; and yet the tea tax was generally resisted in the colonies as an invasion of their liberties.

Mr. Curtis, in his work on the Constitutional History of the United States, speaking of the colonial Congress of 1774, says: "The second question related to the authority which they should allow to be in Parliament; whether they should deny it wholly or deny it only as to internal affairs; admitting it as to external

trade; and if the latter, to what extent and with what restriction. It was soon felt that this question of the authority of Parliament was the essence of the whole controversy. Some denied it altogether. Others denied it as to every species of taxation; while others admitted it to extend to the regulation of external trade, but denied it as to all internal affairs." He adds that in view of the fact that the right of regulating the trade of the whole country could not be well exercised by the separate colonies the alternative was either to set up an American legislature that could regulate such trade or to give the power to Parliament.

The Congress, he says, determined to do the latter, thinking that they could limit the admission by denying that the power extended to taxation and admitting it only so far as was necessary to regulate the external trade of the colony for the common benefit of the whole empire. "They grounded this concession," he says, "'upon the necessities of the case' and 'upon the mutual interests of both countries'"—meaning by this expression to assert that all legislative control over the external and internal trade of the colonies belonged of right to the colonies themselves.

It is difficult to conceive of any theory of the relation of the colonies to the mother country that will support the pretentions and resistance of the colonies throughout, except that which denies in toto the power of the Parliament to legislate for the colonies. If the relation was as described in the debate upon the Declaration of Independence, from which I have quoted, and by Franklin—a federal one like that of England and Scotland before the union—then the British Parliament had no authority to legislate for the colonies. Yet it is certain that many acts of Parliament not involving taxation or revenues were recognized in the colonies. As an illustration, the act of 1766 forbidding the issue of legal tender paper by the colonies.

In an essay by a Virginian, published in London in 1701, the uncertainty of the law in the colonial age is thus described: "It is a great unhappiness that no one can tell what is law and what is not in the plantations. Some hold that the law of England is chiefly to be respected, and, where that is deficient, the laws of the several colonies are to take place; others are of opinion that the laws of the colonies are to take the first place, and that the law of England is of force only where they are silent; others there are who contend for the laws of the colonies, in conjunction with those that were in force in England at the first settlement of the colonies, and lay down that as the measure of our obedience, alleging that

we are not bound to observe any late acts of Parliament in England except such only where the the reason of the law is the same here that it is in England. But, this leaving too great a latitude to the judge, some others hold that no late act of the Parliament of England do bind the plantations, but those only wherein the plantations are particularly named. Thus are we left in the dark in one of the most considerable points of our rights; and, the case being so doubtful, we are too often obliged to depend upon the crooked cord of a judge's discretion in matters of the greatest moment and value."

Perhaps the following is a fair summary of the colonial view, just prior to the Revolution, as to the force of English statute law in the colonies:

First, the general statutes enacted before the institution of any government in the respective colonies were of continued obligation there, so far as they were applicable. This upon the principle that such laws were enacted by Parliaments in which the colonists, being then residents of England, were represented.

Second, that no later act of Parliament had any inherent validity in the colonies; but that the supreme legislative power was vested in the colonial legislature.

Certainly this is the view of the Declaration of Independence. The debate that preceded the formulation and general adoption of this view was long and heated. Particular acts of Parliament were impeached on narrow grounds; but there was no holding ground short of the full denial of the power of Parliament to legislate for the colonies. The Parliament was not a representative body as to the colonies; and a system which recognized the right of Parliament to legislate for the colonies was not a representative system of government. A just colonial system that should preserve by suitable limitations the imperial and general powers of Parliament and reconcile them with free institutions in the colonies was not possible to that generation of Englishmen; and a system of parliamentary government without representation and without agreed limitations was impossible to that generation of Americans.

It will be noticed that very many of the grievances, catalogued in the Declaration of Independence, do not involve questions affecting the constitutional or charter rights of the colonies, but rather bad and vindictive administration, and so a violation of natural rights. The English government in the colonies, as administered, subverted the true purposes of government, namely, to secure to the people the enjoyment of life, liberty, and the pursuit of happiness.

It was not unlawful for the king to refuse his assent to laws, or to prorogue an assembly, or perhaps to fix another than the usual place for its assembling. But when these things were done, not in the exercise of a just discretion, but vexatiously to deprive the people of their rights or to coerce them into a surrender of them — to punish them for things lawfully done — the executive power was abused. This power was not to be directed by whim or malice; but like all other forms of government, for the public welfare. Protection was the condition of allegiance; when the existing government did not protect, the natural right became the supreme law. The resistance made by the colonies to the stamp tax, the tea tax, and other assertions of the powers of Parliament, naturally brought on a conflict with the king and his governors, and this conflict marched in the familiar and inevitable lines — edict and proclamation, thundered against the town meeting and the assembly. The solitary and powerless civil governor was reinforced by ships and soldiers, and the town meeting became a training band — it only remained that these should meet and war was flagrant.

But there were some other constitutional rights that were invaded. The right to transport persons accused of crime to England for trial was asserted by the crown. The English cabinet issued orders directing Governor Barnard of Massachusetts to prosecute an inquiry into the conduct of some of the popular leaders in Massachusetts with a view to transporting them to be tried for their lives, under the pretended authority of a statute of Henry VIII. In 1772 royal instructions were issued to the governor of Rhode Island to organize a commission to inquire into the facts connected with the burning of the royal schooner "Gaspee." The governor was directed by the commission to arrest the parties and to send them with the witnesses upon a naval vessel to England for trial. The colonial assembly, upon the appeal of the governor and Chief Justice Hopkins, referred the matter to the discretion of the chief justice, who declared that he would not give an order to arrest any person for transportation to England for trial. The commission, in its report, condemned the conduct of the commander of the "Gaspee," and after much passion had been excited by this high-handed invasion of the right of trial, the matter was dropped. The result of these attempts was widespread excitement and indignation in the colonies. The Virginia House of Burgesses, on the 16th of May, 1769, passed a resolution declaring that "all trials for treason, misprision of treason, or for any felony or crime whatsoever, committed and done in his majesty's said colony and

dominion, by any person or persons residing therein, ought of right to be had and conducted in and beforé his majesty's courts, held within his said colony, according to the fixed and known course of proceeding" and that the "sending such person or persons to places beyond the sea to be tried, is highly derogatory of the rights of British subjects, as thereby the inestimable privilege of being tried by a jury from the vicinage, as well as the liberty of summoning and producing witnesses on such trial, will be taken away from the party accused."—*Frothingham*, 236.

In 1770 the Privy Council inaugurated a series of royal instructions which ruthlessly disregarded not only the usages of the colonies but directly set at naught the provisions of the colonial charters. They proceeded upon the theory that these royal instructions had the force of law and practically asserted an unlimited and arbitrary power in the crown.

In 1772 Governor Hutchinson, of Massachusetts, under instructions from the crown, refused to receive his salary from the legislature, and the judges' salaries were also ordered to be paid out of the crown treasury. This was regarded as making these officers dependents of the crown and freeing them from that restraint which the power to vote their salaries in the General Court imposed. This "indefinite, imperious and mysterious," as Mr. Frothingham calls it, assertion of the royal prerogative seemed to put every right in jeopardy.

The passage of laws vesting the nomination of the council in Massachusetts in the crown, investing the governor with the power to appoint and remove judges of the inferior courts and other minor officers, and the governor and council with power to appoint sheriffs who were to select the juries, forbidding town meetings except for the choice of officers, without the permission of the governor, and providing for the transportation of offenders and witnesses to other colonies or to England for trial, was a complete and undeniable expression of the purpose of the English government to overthrow not only local government, but liberty, in the colonies. (See *Rise of Republic*, 346–7.)

It was said, even in the House of Lords, that these acts invested "the governor and council with powers with which the British Constitution had not trusted his Majesty and his privy council"; and that "the lives, liberties and properties of the subject were put into their hands without control."

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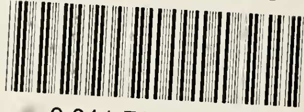
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